

UNITED STATES OF AMERICA)
)
 v.)
)
 Manning, Bradley E.)
 PFC, U.S. Army,)
 HHC, U.S. Army Garrison,)
 Joint Base Myer-Henderson Hall)
 Fort Myer, Virginia 22211)

**Government Motion for
Authorization of Redactions
of DIA Records
under MRE 505(g)(2)**

3 August 2012

RELIEF SOUGHT

COMES NOW the United States of America, by and through undersigned counsel, and respectfully requests this Court: (1) consider the enclosures *in camera* and *ex parte* under Military Rule of Evidence (MRE) 505(g)(2); and (2) authorize redactions of portions of the Defense Intelligence Agency (DIA) records (hereinafter "records") under MRE 505(g)(2) that neither involve investigation, damage assessment, or mitigation measures, nor are otherwise subject to discovery or production under Brady, Rule for Courts-Martial (RCM) 701(a)(2), RCM 701(a)(6), or RCM 703(f).

BURDEN OF PERSUASION AND BURDEN OF PROOF

As the moving party, the United States has the burden of persuasion on any factual issue the resolution of which is necessary to decide the motion. RCM 905(c)(2). The burden of proof is by a preponderance of the evidence. RCM 905(c)(1).

FACTS

On 22 June 2012, the Court ordered (hereinafter "Court's Order") the prosecution to seek out and identify files regarding the accused that involve investigation, damage assessment, or mitigation measures, and to notify the Court with a status of whether it anticipates any government entity that is the custodian of classified evidence that is the subject of the Defense Motion to Compel will seek limited disclosure IAW MRE 505(g)(2) or claim a privilege IAW MRE 505(c) for the classified information under that agency's control.

On 25 July 2012, the prosecution notified the Court that the DIA would seek limited disclosure under MRE 505(g)(2) and would not claim a privilege IAW MRE 505(c).

On 1 August 2012, the prosecution disclosed to the defense DIA records that involve investigation, damage assessment, or mitigation measures, or are otherwise subject to discovery or production under Brady, RCM 701(a)(2), RCM 701(a)(6), or RCM 703(f), and that DIA authorized the prosecution to voluntarily disclose to the defense under MRE 505(g)(1). A total of 4,878 DIA records, consisting of 25,772 pages, were disclosed to the defense.

WITNESSES/EVIDENCE

The United States does not request any witnesses be produced for this motion. The prosecution requests that the Court consider the enclosures listed at the end of this motion.

APPELLATE EXHIBIT 263
PAGE REFERENCED: _____
PAGE _____ OF _____ PAGES

LEGAL AUTHORITY AND ARGUMENT

If classified information is at issue in a court-martial, then the United States may agree to disclose the classified information to the defense under a protective order. See MRE 505(g)(1). Additionally, the United States may motion the Court to "authorize (A) the deletion of specific items of classified information from documents to be made available to the [accused], (B) the substitution of a portion or summary of the information for classified documents, or (C) the substitution of a statement admitting relevant facts that the classified information would tend to prove." MRE 505(g)(2). The military judge "shall authorize" these alternative forms, unless she determines "the disclosure of the classified information itself is necessary to enable the accused to prepare for trial." Id. If a motion is filed under MRE 505(g)(2), then upon request of the United States, the motion "shall" be considered by the military judge *in camera* and "shall not be disclosed to the accused." Id.

The procedures outlined in MRE 505(g)(1) and (2) apply when the United States voluntarily discloses information and does not withhold classified information under MRE 505(c). If the United States intends to withhold information under MRE 505(c), then the United States must move for an *in camera* proceeding under MRE 505(i)(2), obtain an affidavit demonstrating that disclosure of the information reasonably could be expected to cause damage to the national security under MRE 505(i)(3), and follow the notice procedures outlined under MRE 505(i)(4). See MRE 505(i). For the purposes of this filing, the DIA, through the prosecution, is voluntarily disclosing portions of its records pursuant to the Court's Order and is not withholding any classified information under MRE 505(c) and MRE 505(i).

Pursuant to the Court's Order, the prosecution sought out DIA records regarding the accused that involve investigation, damage assessment, or mitigation measures. The prosecution also sought out DIA records subject to discovery or production under Brady, RCM 701(a)(2), RCM 701(a)(6), or RCM 703(f). See Brady v. Maryland, 373 U.S. 83 (1963). The prosecution identified information that involved investigation, damage assessment, or mitigation measures, or is otherwise subject to discovery or production under Brady, RCM 701(a)(2), RCM 701(a)(6), or RCM 703(f). The DIA reviewed that information to determine if it would authorize the prosecution to voluntarily disclose the original classified material to the defense under MRE 505(g)(1) or (g)(2). The DIA determined that the agency would disclose a majority of information under MRE 505(g)(1) and a limited amount of information in a redacted form under MRE 505(g)(2). See Enclosure 3.

The prosecution reviewed the information that the DIA objected to disclose to the defense. This redacted information neither involves investigation, damage assessment, or mitigation measures, nor is otherwise subject to discovery or production under Brady, RCM 701(a)(2), RCM 701(a)(6), or RCM 703(f). Additionally, the information is not "necessary to enable the accused to prepare for trial" under MRE 505(g)(2). Therefore, the defense is not entitled to discovery of the redacted information.

Should the Court find the redacted information is discoverable, or is "necessary to enable the accused to prepare for trial" under MRE 505(g)(2), then the United States requests the opportunity to either: (1) address the Court's findings with the relevant government agency to determine whether a different alternative under MRE 505(g)(2) is appropriate and file that alternative with the Court, or (2) allow for the relevant government agency to claim a privilege under MRE 505(c) and the United States to move for an *in camera* proceeding under MRE 505(i).

The prosecution will not use any redacted portions of the DIA records provided to the Court during any portion of the trial.

CONCLUSION

The United States respectfully requests this Court: (1) consider the enclosures *in camera* and *ex parte* under MRE 505(g)(2), and (2) authorize redactions of portions of the DIA records that neither involve investigation, damage assessment, or mitigation measures, nor are otherwise subject to discovery or production under Brady, RCM 701(a)(2), RCM 701(a)(6), or RCM 703(f).



J. HUNTER WHYTE
CPT, JA
Assistant Trial Counsel

3 Encls

1. Original DIA Records [classified w/ various control measures] [CD provided separately]
2. Redacted DIA Records [classified w/ various control measures] [CD provided separately]
3. DIA Memorandum, dated 3 August 2012